

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DePuy Mitek, Inc.)
a Massachusetts Corporation)
)
Plaintiff,)
)
v.)
)
	Civil No. 04-12457 PBS
 Arthrex, Inc.)
a Delaware Corporation and)
)
 Pearsalls Ltd.)
a Private Limited Company)
of the United Kingdom)
)
Defendants.)
)

**DePuy Mitek's Motion For Leave To Reply In Support Of Its Motion To Strike
Arthrex's Reliance On Its Own Interrogatory Contentions and Dr. Mukherjee's
TigerWire Opinions In Opposition To DePuy Mitek's Motion For
Summary Judgment of Infringement and No Inequitable Conduct**

Mitek moves for leave to reply to Arthrex's opposition to Mitek's motion to strike Arthrex's reliance on its own interrogatory contentions and Dr. Mukherjee's TigerWire opinions. Mitek's motion raised issues regarding the *admissibility* of certain evidence. In opposing Mitek's motion, Arthrex offer no real answer to the admissibility issues. Rather, Arthrex improperly presents new arguments and new evidence in support of its *summary judgment* positions. But Mitek's motion to strike is not a vehicle for submitting new summary judgment evidence and argument. Thus, Mitek moves for leave to point out that Arthrex's new evidence and argument is non-responsive to Mitek's motion to strike and should not be considered in deciding the parties summary judgment motions. Mitek's proposed short reply is attached hereto. The parties met and conferred regarding this motion but were unable to resolve the issue.

Dated: October 12, 2006

DEPUY MITEK, INC.,
By its attorneys,

/s/ Michael J. Bonella

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CERTIFICATE OF SERVICE

I certify that I am counsel for DePuy Mitek, Inc. and that a true and correct copy of:

**DePuy Mitek's Motion For Leave To Reply In Support Of Its Motion To Strike
Arthrex's Reliance On Its Own Interrogatory Contentions and Dr. Mukherjee's
TigerWire Opinions In Opposition To DePuy Mitek's Motion For Summary
Judgment of Infringement and No Inequitable Conduct**

was served on counsel for Defendants Arthrex, Inc. and Pearsalls Ltd. on this date via the Court's e-mail notification with the following recipients being listed as filing users for Defendants:

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Dated: October 12, 2006

/s/ Michael J. Bonella
Michael J. Bonella

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**Plaintiff DePuy Mitek's Reply In Support Of Its Motion To Strike Arthrex's
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Arthrex's opposition to Mitek's motion to strike is largely non-responsive to Mitek's motion to strike. Mitek's motion raised two simple evidentiary issues, namely whether Arthrex's contention interrogatory responses are inadmissible hearsay and whether Dr. Mukherjee's opinions with respect to TiberWire/nylon were admissible. Having basically no answer to the *admissibility issues*,¹ Arthrex improperly submits new arguments and new evidence in support of its *summary judgment positions*. For example, Arthrex asserts new evidence and arguments on the tipping, reverse doctrine of equivalents, and coating/material effects issues in sections III.A.1 and III.A.2 and section III.C. of its memorandum. Such contentions are irrelevant to the admissibility issues presented by Mitek's motion. Therefore, they should not be considered in

¹ Contrary to Dr. Mukherjee's sworn testimony, Arthrex asserts that Dr. Mukherjee did conduct tests with TigerWire. Arthrex's counsel's assertions are not evidence that can be used to contradict his deposition testimony. Tellingly, Arthrex submits no affidavit from Dr. Mukherjee on the issue. But in any event, Arthrex has no answer to the remainder of Mitek's reasons for striking Arthrex's evidence. The remainder of Arthrex's response is so weak on the admissibility issues that Mitek need not even address it.

deciding the summary judgment motions. But if they are to be considered, Mitek should be afforded the opportunity to respond to this new evidence and argument, and Mitek requests an order permitting it to do so if Arthrex's new evidence and argument is to be considered on summary judgment.

Although Mitek will not respond to all of Arthrex's new improper arguments here, Mitek is compelled to respond briefly to the most noticeable of Arthrex's new assertions. Arthrex cannot dispute that Dr. Burks admitted that the differences between coated and uncoated were "subtle." Accordingly, Arthrex now tries to spin his testimony. Arthrex now asserts for the first time that the only relevant comparison for the issue of whether FiberWire's coating has a material affect is when FiberWire is wet, and since Dr. Burk's "subtle" testimony was supposedly only about dry sutures, it should be disregarded. Arthrex further asserts that Dr. Burks was never asked about comparing wet sutures. But Arthrex is wrong.

Before the deposition, Dr. Burks conducted a "tactile feel" test for Arthrex which included feeling the uncoated and coated FiberWire sutures in both dry and wet states (Ex. 9 at 68:24-69:19). Dr. Burks testimony about "subtle" was with respect to this "tactile feel" test and it did not distinguish between the states (*id.* at 87:7-13). Lest there be any doubt on the issue, Dr. Burks was asked about his "tactile feel" test *in total*, which encompassed both wet and dry sutures, and Dr. Burks admitted that the coated and uncoated sutures were "pretty close" (*i.e.* the differences were immaterial):

Q. *Were there any of the sutures in the tactile feel analysis where you couldn't tell the difference between suture A and suture B?*

A. It was not my intent at the time in looking at the sutures to compare each strand side to side. My intent was to look at sort of spool A and spool B. So it was to get a feel of, in general, how do they feel between the two.

So I didn't take a strand and say is this one different? And is this one different? And go down through that five times, because I felt it was all the same suture.

Q. But were there any where you couldn't tell a difference? I mean, it was pretty close?

A. *Sure, it was pretty close.*

(*id.* at 87:14-88:3). As this evidence closes the door on Arthrex's case, Arthrex ignores it.

Further, contrary to Arthrex's assertions, Dr. Burks was specifically asked about wet sutures, and he even admitted that when analyzing knot tie-down of wet coated and uncoated FiberWire it was not fair to say that there was always a difference (*id.* at 84:25-86:1). Again, that testimony is unrebutted. Also, Dr. Burks' unrebutted testimony -- that gloves make a difference and he could not opine that there were differences between coated and uncoated FiberWire if he used gloves -- kills Arthrex's contention that there is any material difference (*id.* at 73:9-14; 96:24-97:14).

Significantly, when he conducted his blind analysis at the deposition, Dr. Burks was offered the use of water (*id.* at 92:13-16). But he chose not to use it. Surely, he wanted to get it right at the deposition, so if water really made that big of a difference in his mind, he would have leaped at the chance to use it to distinguish between the sutures. The fact that he did not use it is telling as to whether Dr. Burks thinks that it matters.

Arthrex's new position is a transparent, last-minute attempt to save itself from its own expert's testimony. Notably, Arthrex did not draw this wet/dry distinction previously in any of its assertions about the purported effects of coatings. The record evidence is clear that in the eyes of a person that matters, a surgeon, any differences between coated and uncoated FiberWire are immaterial.

Dated: October 12, 2006

DEPUY MITEK, INC.,

By its attorneys,

/s/ Michael J. Bonella

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was served on counsel for Defendants Arthrex, Inc. and Pearsalls Ltd. on this date via the Court's e-mail notification with the following recipients being listed as filing users for Defendants:

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Dated: October 12, 2006

/s/ Michael J. Bonella
Michael J. Bonella

Exhibit 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

-O-

DEPUY MITEK, INC., a :
Massachusetts Corporation, : Civil Action No.
Plaintiff, : 04-12457 PBS

-vs-

ARTHREX, INC., a Delaware :
Corporation, and PEARSALLS : EXPERT DEPOSITION OF:
LTD., a Private Limited : ROBERT T. BURKS, M.D.
Company of the United
Kingdom,

Defendants.

-O-

Location: Marriott University Hotel
Salt Lake City, Utah

Date: June 7, 2006
3:00 p.m.

Reporter: Denise Kirk, CSR/RPR

-O-

<p>1 A. Ten, 15 minutes.</p> <p>2 Q. About how long did it take to perform the 3 knot tie-down analysis as reflected in Exhibit 232 4 from the time you cut the sutures off the spools until 5 the time you concluded there was a difference between 6 suture A and suture B?</p> <p>7 A. Maybe 45 minutes. Can we stop one second?</p> <p>8 MR. FALKE: Sure.</p> <p>9 THE VIDEOGRAPHER: Off the record, 4:52.</p> <p>10 (Discussion off the record.)</p> <p>11 THE VIDEOGRAPHER: On the record, 4:56.</p> <p>12 Q. (By Mr. Falke) Can you please describe the 13 tactile field analysis as shown in paragraph 11 of 14 Exhibit 232?</p> <p>15 A. Well, it was a very subjective test of 16 taking the suture and running it through the 17 fingertips and pulling it back and forth. Nothing 18 fancy.</p> <p>19 Q. Other than running it through your 20 fingertips and pulling it back and forth, did you do 21 anything else in the tactile feel analysis?</p> <p>22 A. No.</p> <p>23 Q. How many times did you perform the tactile 24 feel analysis in Exhibit 232, paragraph 11?</p> <p>25 A. I'm not sure I could give you a specific</p>	<p>66</p> <p>1 the suture?</p> <p>2 A. I guess I assumed that a coating would 3 make it smoother.</p> <p>4 Q. Anything else?</p> <p>5 A. No.</p> <p>6 Q. In the tactile feel analysis, which you 7 just described, it sounds like what you described was 8 just in the dry environment, is that correct?</p> <p>9 A. That part, yes.</p> <p>10 Q. Did you perform the tactile feel analysis 11 in a wet environment as well?</p> <p>12 A. No, it was more knot-tying.</p> <p>13 Q. So you did not test FiberWire in a wet 14 environment in the tactile feel analysis in Exhibit 15 Number 232?</p> <p>16 A. No.</p> <p>17 Q. But in paragraph 11 it says: "The 18 difference between the two samples was even more 19 pronounced when they were wet, which is how I'm 20 accustomed to using FiberWire"?</p> <p>21 A. Yes. That is, when you are tying knots and 22 you are doing it in the wet environment, then you're 23 feeling the sutures.</p> <p>24 Q. Right, but if you look at paragraph 11 in 25 Exhibit 232, paragraph 11 deals with the tactile feel</p>
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<p>1 answer on that from memory. I would say six to eight.</p> <p>2 Q. On each --</p> <p>3 A. On each sample set.</p> <p>4 Q. Okay. On each sample set or on each 5 individual suture in the sample?</p> <p>6 A. I did not do each individual suture.</p> <p>7 Q. So you did not actually perform a tactile 8 feel analysis on each of the five sutures in suture 9 set A and suture set B?</p> <p>10 A. Probably that would be true.</p> <p>11 Q. So then you can't say for sure whether all 12 of the five in suture A were generally smoother than 13 the five in suture B, is that right?</p> <p>14 A. They all came from the same spool so the 15 properties of one strand should be pretty similar to 16 the properties of the next strand.</p> <p>17 So the short answer would be yes, I didn't 18 compare each strand but the strands I felt would be 19 pretty representative coming from the same length.</p> <p>20 Q. You can't say for sure that all the five 21 in A were smoother than all five in suture B?</p> <p>22 A. Correct.</p> <p>23 Q. Prior to performing the tactile feel 24 analysis in Exhibit 232, did you have any preconceived 25 impression of how the coating would affect the feel of</p>	<p>67</p> <p>1 analysis, right?</p> <p>2 A. Correct, so what I'm saying on the tactile 3 feel analysis is I'm feeling it in a dry environment 4 where I'm not doing anything with the suture, just 5 feeling it in a dry environment. Then I feel it in 6 the wet environment when I'm tying knots.</p> <p>7 Q. So in paragraph eleven when it says "was 8 more pronounced when they were wet which is how I'm 9 accustomed to using FiberWire" that's not true, 10 though, right? You didn't perform --</p> <p>11 A. I think the confusion is maybe how I 12 worded this. So when tying knots it's not -- I didn't 13 view it personally as being totally separate of 14 tactile over here and then a tactile over here.</p> <p>15 When you are tying the knot, you feel the 16 suture and you are sliding the knot on it. That was 17 part of my assessment when I'm tying the knot. It 18 wasn't just laying it out and feeling it. It's a 19 combination.</p> <p>20 Q. How do you know that the samples being wet 21 was more pronounced in the tactile feel analysis if 22 you did not do the tactile feel analysis on a wet 23 suture?</p> <p>24 MR. TAMBURO: Objection; asked and 25 answered, mischaracterizes the testimony.</p>
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1 A. I'll try to clarify again. I didn't, in my
 2 mind, view it as a pure test A/test B. So when you
 3 handle suture tying knots and doing things with it,
 4 you have a tactile feel. So I didn't -- so that's part
 5 of the knot tying. So I didn't segregate it out as two
 6 isolated separate things.

7 Q. So in your report, Exhibit 232, are you
 8 making two conclusions based on a conclusion of the
 9 tactile feel analysis and a conclusion based on the
 10 knot tie-down analysis?

11 A. I'll try to clarify again. A knot tie-down
 12 analysis I view as having a tactile aspect to it as
 13 well, you are feeling the suture as you tie it. So I
 14 don't view them as totally isolated.

15 Q. Okay. So how many analyses did you
 16 perform as reflected in Exhibit 232?

17 A. I used all the strands and tied multiple
 18 knots on all the strands. So I'm not, I guess, quite
 19 sure -- I can't tell you I did 20 knots on each strand
 20 or 30, but they were each used for multiple knot
 21 tying.

22 Q. My question might have been unclear. Not
 23 how many times did you perform the analysis, but how
 24 many different analyses did you do in coming to the
 25 conclusions as expressed in Exhibit Number 232?

70 71 72
 1 A. I tried to try knots partly with gloves to
 2 see if I felt that there was a difference and partly
 3 without gloves to see if I could feel a difference.
 4 Q. Did using gloves in the tests in Exhibit
 5 232 affect your ability to distinguish between suture
 6 A and suture B?

7 A. I think, clearly, using gloves makes the
 8 feel of the suture a little different. I guess I can't
 9 answer directly to say if it makes the difference but,
 10 yes, it probably makes a difference.

11 Q. What difference does it make?

12 A. You are covering your skin with the
 13 gloves, so, you know, as you feel suture, your
 14 absolute sensation of the suture probably changes
 15 some.

16 Q. Could you have reached the same
 17 conclusions you reached in Exhibit 232 if you solely
 18 used gloves in performing the tests?

19 A. I didn't do it that way, so I guess I
 20 can't answer that and say yes or no.

21 Q. Did not using gloves help you to
 22 distinguish between suture A and suture B?

23 A. Potentially, yes.

24 Q. Did it or -- I'm asking you if, in fact,
 25 it did?

71 72
 1 MR. TAMBURRO: Objection, vague.
 2 A. I felt the suture and I tied knots with
 3 the suture.

4 Q. But earlier you testified that that's all
 5 encompassed in the knot tie-down analysis. So I'm
 6 wondering did you do a knot tie-down analysis and
 7 that's it and that had two subparts or two different
 8 analyses and then come up with a conclusion -- come up
 9 with two different conclusions?

10 MR. TAMBURRO: Objection, mischaracterizes
 11 the testimony.

12 A. Again, I'm not trying to characterize in
 13 this that these are segregated separate tests, but
 14 this was a tactile feel and knot tying. It was a
 15 length subjective feel on both of those.

16 So when you tie knots, you get a tactile
 17 feel. So I was making the statement that on the
 18 tactile feel, how it feels to me, it felt this way and
 19 when I tied knots, it also felt that way. It's
 20 sometimes hard to do one without doing the other.

21 Q. When you were doing -- when you did the
 22 tactile feel analysis and the knot tie-down analysis
 23 as expressed in Exhibit 232 were you wearing gloves?

24 A. Not always.

25 Q. Can you explain the breakdown?

73
 1 A. And I'm telling you my answer is it
 2 potentially did.

3 Q. I don't think I understand that. How could
 4 it potentially? I mean either it did or didn't,
 5 right?

6 A. No.

7 MR. TAMBURRO: Objection, argumentative.

8 Q. Why do you say "potentially"?

9 A. I'm trying to be honest. I did feel
 10 without gloves and I know there's a pile A and a pile
 11 B, so there is potential that feeling suture without
 12 gloves made me feel that A was a little different than
 13 B that had I been gloved the entire time, I might not
 14 have detected.

15 Q. So from start to finish then after you cut
 16 the suture samples until the time you made your
 17 conclusions expressed in Exhibit Number 232, how long
 18 was that?

19 A. I'll give you the same answer: 45 minutes
 20 or so.

21 Q. So the 45 minutes encompassed roughly ten
 22 minutes you spent on the tactile feel analysis?

23 A. No.

24 Q. So 45 minutes plus ten minutes or just 45
 25 minutes?

<p>1 (Brief recess.)</p> <p>2 THE VIDEOGRAPHER: Back on the record on</p> <p>3 record 5:38.</p> <p>4 Q. (By Mr. Falke) Dr. Burks, can you explain</p> <p>5 the knot tie-down analysis that you conducted as</p> <p>6 reflected in Exhibit 232, paragraph 12?</p> <p>7 A. It was taking a strand, tying a knot on</p> <p>8 it, sliding the knot down and then putting another</p> <p>9 knot/half hitch, whatever you want to describe it, and</p> <p>10 sliding it down.</p> <p>11 Q. What did you tie the suture samples on?</p> <p>12 A. A hook.</p> <p>13 Q. What type of hook was it?</p> <p>14 A. Just a simple sort of brass hook.</p> <p>15 Q. Did you use the same knot configuration</p> <p>16 for each comparison?</p> <p>17 A. I used the same knots for the different</p> <p>18 groups, but I varied knots to see how different knots</p> <p>19 might feel.</p> <p>20 Q. But for each knot that you tied on suture</p> <p>21 B, you did that same knot on suture A?</p> <p>22 A. Right, right.</p> <p>23 Q. About how many knots did you tie in total</p> <p>24 in the knot tie-down analysis for each suture set,</p> <p>25 generally?</p>	<p>82</p> <p>1 A. I mean, I took each strand from each set</p> <p>2 and I tied multiple knots, if you will, in each strand</p> <p>3 so each strand may have had 20 throws in it and . . .</p> <p>4 Q. So does that mean then you did five</p> <p>5 comparisons? You did a knot configuration for each of</p> <p>6 the suture samples?</p> <p>7 MR. TAMBURNO: Objection; mischaracterizes</p> <p>8 the testimony, asked and answered.</p> <p>9 A. I guess I'm trying to go with you, I'm</p> <p>10 just not sure what you . . .</p> <p>11 Q. When you say "comparisons", I mean,</p> <p>12 regardless of the knot configurations or how many</p> <p>13 particular knots were on the one suture, you compared</p> <p>14 that configuration, whatever it is, to the other</p> <p>15 suture set, right?</p> <p>16 A. Correct.</p> <p>17 Q. How many times did you do that?</p> <p>18 MR. TAMBURNO: Objection, vague.</p> <p>19 A. I guess one would say that's five. So the</p> <p>20 five strands in one set got compared to the five</p> <p>21 strands in the other set.</p> <p>22 Q. Right. Did you wet the suture when you did</p> <p>23 the knot tie-down analysis?</p> <p>24 A. Yes.</p> <p>25 Q. How did you wet the sutures?</p>
<p>1 MR. TAMBURNO: Objection, vague.</p> <p>2 A. When you say suture set, you mean the</p> <p>3 group of sutures or the individual strand?</p> <p>4 Q. The set of five.</p> <p>5 A. Okay.</p> <p>6 Q. So as an example, if you did 30 total</p> <p>7 knots is that 15 per suture A and suture B? Let me</p> <p>8 rephrase the question or repeat the question. About</p> <p>9 how many knots did you tie in total for each suture</p> <p>10 set when you did the knot tie-down analysis?</p> <p>11 A. I think it would be, again, hard to give</p> <p>12 you a specific number. I'm not trying to be vague,</p> <p>13 it's just that when you say a knot, for example, I'm</p> <p>14 trying to say that I might throw a half hitch down</p> <p>15 which isn't technically a complete knot, and then I</p> <p>16 might throw another half hitch, so there might be</p> <p>17 multiple half hitches that you could consider one knot</p> <p>18 or you could consider it 20 throws and 20 knots.</p> <p>19 Q. Let me try to help you out there then. How</p> <p>20 many comparisons then did you do in the knot tie-down</p> <p>21 analysis between suture A and suture B?</p> <p>22 MR. TAMBURNO: Objection, vague.</p> <p>23 Q. Do you understand that?</p> <p>24 A. I can tell you what I did and . . .</p> <p>25 Q. Please.</p>	<p>83</p> <p>1 A. With tap water.</p> <p>2 Q. Can you explain that?</p> <p>3 A. Sure, I just filled a glass with water and</p> <p>4 put the suture down in it and then tied the knots.</p> <p>5 Q. Did you wet them one at a time?</p> <p>6 A. Yes.</p> <p>7 Q. How long did the suture stay submerged in</p> <p>8 water?</p> <p>9 A. Briefly. Three or four seconds.</p> <p>10 Q. But the same amount of time in the water</p> <p>11 for each suture?</p> <p>12 A. Yes.</p> <p>13 Q. Do you know if the sutures absorb water</p> <p>14 when they're wet?</p> <p>15 A. No.</p> <p>16 Q. You don't know?</p> <p>17 A. No.</p> <p>18 Q. Were each of the -- you come to the</p> <p>19 conclusion in paragraph number 12 of Exhibit 232 that</p> <p>20 when suture A -- there was less friction when sliding</p> <p>21 the knot on the sample labeled suture A as compared</p> <p>22 with sample labeled B. Was that true for all five</p> <p>23 suture samples?</p> <p>24 A. That was a sum feeling on my part. So it</p> <p>25 might not be fair to say it's true on every strand but</p>

<p>86 1 it was my overall take from looking at them.</p> <p>2 Q. Do you remember how many -- strike that.</p> <p>3 Does a suture that has less friction when</p> <p>4 sliding that knot mean that the suture has better knot</p> <p>5 tie-down performance?</p> <p>6 A. Not necessarily.</p> <p>7 Q. Why?</p> <p>8 A. Well, if you envision a perfectly smooth</p> <p>9 suture, for example, if you slide a knot it might</p> <p>10 slide very easily but it might also tend to not hold</p> <p>11 as well because there's not as much inherent friction</p> <p>12 in it.</p> <p>13 Q. Does a smoother suture mean it has better</p> <p>14 tactile feel than a suture that is not as smooth?</p> <p>15 A. I would say no, I don't know that I'd say</p> <p>16 it's a better tactile feel.</p> <p>17 Q. Why did you use a surgeon's knot when you</p> <p>18 did the knot tie-down analysis in Exhibit 232?</p> <p>19 A. I think what I would do is say that --</p> <p>20 again, maybe my critique of the verbiage would be at</p> <p>21 fault. So I guess I wouldn't -- you know, we talked</p> <p>22 earlier about what a surgeon's knot is.</p> <p>23 Q. Uh-huh?</p> <p>24 A. And I probably didn't focus on it enough</p> <p>25 to say that they're not necessarily surgeons' knots as</p>	<p>88 1 Q. But were there any where you couldn't tell</p> <p>2 a difference? I mean, it was pretty close?</p> <p>3 A. Sure, it was pretty close.</p> <p>4 Q. Let me rephrase. Were there any where you</p> <p>5 couldn't tell the difference between suture A and</p> <p>6 suture B?</p> <p>7 MR. TAMBURO: Objection, asked and</p> <p>8 answered.</p> <p>9 A. I don't remember specifically having ones</p> <p>10 that I would say I clearly feel a difference on this</p> <p>11 one and I clearly don't on the next one. It was a</p> <p>12 general feel of all of them.</p> <p>13 Q. Dr. Burks, how would you describe your</p> <p>14 relationship with Ethicon?</p> <p>15 A. I guess none.</p> <p>16 Q. None? So you would say that you have a</p> <p>17 closer relationship with Arthrex?</p> <p>18 A. Yes.</p> <p>19 Q. What about could you describe your</p> <p>20 relationship with DePuy Mitek?</p> <p>21 A. I have been a consultant with DePuy Mitek.</p> <p>22 Just this week I was helping on an educational course</p> <p>23 for DePuy Mitek reps. But I've had no product or</p> <p>24 anything like that with DePuy Mitek.</p> <p>25 Q. You mean development product work?</p>
<p>87 1 I described them.</p> <p>2 Q. Okay, so why did you use the particular</p> <p>3 knots, then, that you used in the knot tie-down</p> <p>4 analysis?</p> <p>5 A. I just tried to reproduce what I do in the</p> <p>6 operating room.</p> <p>7 Q. In paragraph 11 in Exhibit 232 you state</p> <p>8 that suture A generally felt smoother than suture B.</p> <p>9 What do you mean by "generally"?</p> <p>10 A. The differences between the sutures were</p> <p>11 subtle. I mean, they were not sharp, distinct. So I'm</p> <p>12 meaning that in comparing them, my take was that it</p> <p>13 was generally smoother.</p> <p>14 Q. Were there any of the sutures in the</p> <p>15 tactile feel analysis where you couldn't tell the</p> <p>16 difference between suture A and suture B?</p> <p>17 A. It was not my intent at the time in</p> <p>18 looking at the sutures to compare each strand side to</p> <p>19 side. My intent was to look at sort of spool A and</p> <p>20 spool B. So it was to get a feel of, in general, how</p> <p>21 do they feel between the two.</p> <p>22 So I didn't take a strand and say is this</p> <p>23 one different? And is this one different? And go</p> <p>24 down through that five times, because I felt it was</p> <p>25 all the same suture.</p>	<p>89 1 A. Yes.</p> <p>2 Q. What was the educational course this last</p> <p>3 week that you helped with DePuy Mitek?</p> <p>4 A. It was educating reps who go into the</p> <p>5 operating room and, you know, are helping surgeons</p> <p>6 with their materials, sutures, implants, what not, and</p> <p>7 how to handle the operating room environment, be</p> <p>8 appropriate and be helpful.</p> <p>9 Q. The course was not on a particular DePuy</p> <p>10 Mitek technique or anything like that, it was --</p> <p>11 A. It was not focused on a particular product</p> <p>12 but it was focused on helping reps better sell DePuy</p> <p>13 Mitek products.</p> <p>14 Q. By being more professional in the</p> <p>15 operating room?</p> <p>16 A. Correct.</p> <p>17 Q. Is this the first time you have done that</p> <p>18 for DePuy Mitek?</p> <p>19 A. This is the second.</p> <p>20 Q. Other than those two courses, have you</p> <p>21 consulted with DePuy Mitek in any other courses?</p> <p>22 A. Yes.</p> <p>23 Q. What are those?</p> <p>24 A. There was an educational course in Chicago</p> <p>25 and you are going to say when and I'm going to guess</p>

<p>1 four years ago. It was a cadaver course where they 2 were doing DePuy Mitek products and they asked me to 3 come give a couple of talks and help in the lab using 4 those products with the doctors who were there.</p> <p>5 Q. Do you remember what those products were?</p> <p>6 A. Not specifically. They were suture 7 anchors, suture passing instruments, but I don't 8 remember a specific product.</p> <p>9 Q. Are you a consumer of DePuy Mitek 10 products?</p> <p>11 A. Sure.</p> <p>12 Q. What DePuy Mitek products do you use?</p> <p>13 A. Well, I mentioned earlier I use OrthoCord. 14 I use some DePuy Mitek anchors. They make an electric 15 cautery unit that we use, in every case we use 16 electric cautery.</p> <p>17 They have some suture-passing instruments 18 that we use. I use one of their drill guides and 19 fixation sets for ACL surgery.</p> <p>20 Q. When you do an ACL fixation, what product 21 do you use?</p> <p>22 A. It depends on the type of ACL that we're 23 doing. If I use a bone/tendon/bone graft which is a 24 common graft, on the femoral side, I fix it with a 25 DePuy Mitek device which is a couple of absorbable</p>	<p>90</p> <p>1 manufacturing state that those sutures have gone 2 through. And I'm wondering if you can look at those. 3 analyze them, do whatever you have to do, but tell me 4 which ones are coated and which ones are not coated, 5 if any?</p> <p>6 A. So these are three separate types of 7 suture?</p> <p>8 Q. They're three different sutures. Well, 9 I'm going to take that back. I don't know if they're 10 three different sutures.</p> <p>11 MR. TAMBURO: You are not sure what they 12 are.</p> <p>13 MR. FALKE: We know what they are, yeah. I 14 mean, based on Pearsalls' representations of what they 15 are. If you need to cut them and get you a glass of 16 water, if you want to wet them.</p> <p>17 MR. TAMBURO: Are they in the same form in 18 which they were produced?</p> <p>19 MR. FALKE: Yes, we did not alter them.</p> <p>20 MR. TAMBURO: Do we have Bates numbers?</p> <p>21 Q. Slow down. Just for the record, so the 22 record is clear, what did you just do, Dr. Burks?</p> <p>23 A. I just opened the suture that was in the 24 bag.</p> <p>25 Q. What Exhibit Number is that?</p>
<p>91</p> <p>1 pins, and on the tibial side I fix it with either a 2 DePuy Mitek screw or a screw from a different company 3 depending on upon quality.</p> <p>4 On the hamstring, I typically on the 5 femoral side use a Smith and Nephew product --</p> <p>6 Q. EndoButton?</p> <p>7 A. EndoButton. On the tibial side I 8 typically use a Milagro screw and frequently for the 9 post use that Arthrex screw.</p> <p>10 Q. When you say hamstring, that's soft 11 tissue?</p> <p>12 A. Correct.</p> <p>13 Q. Semitendonosis?</p> <p>14 A. Very good.</p> <p>15 MR. TAMBURO: We're all half doctors here.</p> <p>16 MR. FALKE: Let's take a break.</p> <p>17 THE VIDEOGRAPHER: Off the record, 5:54.</p> <p>18 (Brief recess.)</p> <p>19 THE VIDEOGRAPHER: On the record, 6:02.</p> <p>20 Q. (By Mr. Falke) Dr. Burks, I'm going to 21 hand you DePuy Mitek Exhibit 286, DePuy Mitek Exhibit 22 284 and DePuy Mitek 285. These are FiberWire samples 23 that were produced to us from Pearsalls who is a 24 company that makes FiberWire for Arthrex.</p> <p>25 I covered up on those exhibits the</p>	<p>93</p> <p>1 A. That is 286.</p> <p>2 Q. You cut a piece off of the suture in 3 Exhibit 286?</p> <p>4 A. Right.</p> <p>5 Q. And --</p> <p>6 MR. TAMBURO: There's no Bates numbers on 7 these?</p> <p>8 MR. FALKE: There were no Bates numbers.</p> <p>9 Q. Would you put that on the suture you cut 10 from Exhibit 286 and mark with a pen Exhibit 286.</p> <p>11 Now, can you explain what you are doing now, Dr. 12 Burks? First, can you put the suture that you took out 13 of 286 back in the bag?</p> <p>14 A. (Witness complies.)</p> <p>15 Q. Thank you, and then proceed. Can you 16 explain for the record what you are doing now?</p> <p>17 A. I'm opening 285.</p> <p>18 Q. You are cutting suture sample from Exhibit 19 285, right?</p> <p>20 A. Yes.</p> <p>21 Q. Could you please mark with the tape 22 Exhibit 285 that you've cut? Proceed. Can you state 23 what for the record what you are doing now?</p> <p>24 A. I'm opening number 284.</p> <p>25 Q. And cutting a suture from Exhibit 284?</p>

<p>1 A. Yes.</p> <p>2 Q. And now you are going to mark the suture</p> <p>3 sample that you took from Exhibit 284 with a flag?</p> <p>4 A. Correct.</p> <p>5 Q. Can you hand me the original sample sets</p> <p>6 back?</p> <p>7 A. (Witness complies.)</p> <p>8 Q. Also, I'm going to hand you DePuy Mitek</p> <p>9 Exhibit 234 which is a chart I'd like you to fill out</p> <p>10 if you could, please, and under the suture column put</p> <p>11 the numbers corresponding to the suture samples you've</p> <p>12 just cut, just 284, 285 and 286?</p> <p>13 A. Fair enough?</p> <p>14 Q. Fair enough.</p> <p>15 A. Have we got a while?</p> <p>16 Q. However long it takes you.</p> <p>17 MR. TAMBURO: Are you representing that</p> <p>18 one of them is coated, one of them is not coated?</p> <p>19 MR. FALKE: I'm not making any</p> <p>20 representations. They could all be coated, they could</p> <p>21 all be uncoated, could be a mix?</p> <p>22 A. Can I use your notebook?</p> <p>23 Q. Of course. What do you need?</p> <p>24 A. I was going to use one of those metal</p> <p>25 rings.</p>	94	96
<p>1 Q. Sure. First, can you do a tactile feel</p> <p>2 analysis on it? Can you tell the difference?</p> <p>3 A. Kind of -- like I said, when you tie knots</p> <p>4 you combine that together.</p> <p>5 Q. Can you explain what you are doing now?</p> <p>6 A. I don't want to knock your little deal</p> <p>7 off, you know? I'm just getting a sense for how it</p> <p>8 slides and trying to put down a couple of throws.</p> <p>9 Q. Which Exhibit Number are you working on?</p> <p>10 A. I'm on 285.</p> <p>11 Q. Okay. What type of knots are you throwing?</p> <p>12 A. Half hitches.</p> <p>13 Q. Now, can you explain what you are doing,</p> <p>14 Dr. Burks?</p> <p>15 A. Same thing.</p> <p>16 Q. With which exhibit?</p> <p>17 A. 286.</p> <p>18 Q. Are you doing the same thing you did with</p> <p>19 the previous one?</p> <p>20 A. Yes.</p> <p>21 Q. Same knot configurations?</p> <p>22 A. Uh-huh.</p> <p>23 Q. Can you tell a difference between the</p> <p>24 first two sutures, Dr. Burks, Exhibit 285 and --</p> <p>25 A. 286.</p>	95	97